IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

UNITED STATES OF AMERICA and STATE OF NORTH DAKOTA, Plaintiffs, v. MINNKOTA POWER COOPERATIVE, Inc. and SQUARE BUTTE ELECTRIC COOPERATIVE, Defendants.	)	Civil Action No:

CONSENT DECREE

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WHEREAS, Plaintiffs, the United States of America ("the United States"), on behalf of the United States Environmental Protection Agency ("EPA"), and the State of North Dakota ("State"), have filed a Complaint for injunctive relief and civil penalties pursuant to Sections 113(b)(2) and 167 of the Clean Air Act (the "Act"), 42 U.S.C. §§ 7413(b)(2) and 7477, alleging that Defendants, Minnkota Power Cooperative ("Minnkota") and Square Butte Electric Cooperative ("Square Butte") have undertaken construction projects at major emitting facilities in violation of the Prevention of Significant Deterioration provisions of Part C of Subchapter I of the Act, 42 U.S.C. §§ 7470-7492, and in violation of the federally approved and enforceable North Dakota State Implementation Plan;

WHEREAS, in their Complaint, the United States and the State (collectively, "the Plaintiffs") allege, *inter alia,* that Minnkota and Square Butte (collectively, the "Settling Defendants") failed to obtain the necessary permits and install the controls necessary under the Act to reduce their sulfur dioxide (SO_2), nitrogen oxide (NO_x), and/or particulate matter (PM) emissions;

WHEREAS, the Complaint alleges claims upon which relief can be granted against the Settling Defendants under Sections 113 and 167 of the Act, 42 U.S.C. §§ 7413 and 7477;

WHEREAS, the United States provided the Settling Defendants and the State with actual notice of alleged violations in accordance with Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1);

WHEREAS, the Settling Defendants assert that there may be difficulty associated with the continuous operation of Flue Gas Desulfurization Systems at the Milton R. Young Station during the extremely cold ambient air temperatures at the plant in the winter months, and the

Parties have considered these circumstances in reaching this agreement;

WHEREAS, the Settling Defendants assert that it would be very difficult to install and continuously operate certain NO_x emission controls at the cyclone-fired, lignite-burning Units at the Milton R. Young Station;

WHEREAS, NDDH contemplates that, upon full implementation of the controls and other requirements of this Consent Decree, the Settling Defendants will have installed BACT-level SO_2 controls for purposes of netting under this Decree;

WHEREAS, the Parties have agreed that settlement of this action is in the best interest of the Parties and in the public interest, and that entry of this Consent Decree without further litigation is the most appropriate means of resolving this matter;

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated in good faith and at arm's length and that this Consent Decree is fair, reasonable, consistent with the goals of the Act, and in the public interest;

WHEREAS, the Settling Defendants have cooperated in the resolution of this matter;

WHEREAS, the Settling Defendants have denied and continue to deny the violations alleged in the Complaint, and nothing herein shall constitute an admission of liability; and

WHEREAS, the Parties have consented to entry of this Consent Decree without trial of any issues;

NOW, THEREFORE, without any admission of fact or law, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over this action, the subject matter herein, and the Parties consenting hereto, pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and 1367, and pursuant to Sections 113 and 167 of the Act, 42 U.S.C. §§ 7413 and 7477. Venue is proper under Section 113(b) of the Act, 42 U.S.C. § 7413(b), and under 28 U.S.C. § 1391(b) and (c). Solely for the purposes of this Consent Decree and the underlying Complaint, the Settling Defendants waive all objections and defenses that they may have to the Court's jurisdiction over this action, to the Court's jurisdiction over the Settling Defendants, and to venue in this District. The Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. For purposes of the Complaint filed by the Plaintiffs in this matter and resolved by the Consent Decree, and for purposes of entry and enforcement of this Consent Decree, the Settling Defendants waive any defense or objection based on standing. Except as expressly provided for herein, this Consent Decree shall not create any rights in any party other than the Parties to this Consent Decree. Except as provided in Section XXV (Public Comment) of this Consent Decree, the Parties consent to entry of this Consent Decree without further notice.

II. APPLICABILITY

2. Except as set forth in Paragraph 3, the provisions of this Consent Decree shall, upon entry, apply to and be binding upon the Settling Defendants and their successors and assigns, and upon the Settling Defendants' officers, employees and agents solely in their capacities as such.

3. Upon entry, the provisions of this Consent Decree that relate exclusively to Unit 1 at the Milton R. Young Station shall only apply to and be binding upon Minnkota, and its

successors and assigns, and upon Minnkota's officers, employees and agents solely in their capacities as such.

4. The Settling Defendants shall provide a copy of this Consent Decree to all vendors, suppliers, consultants, contractors, agents, and any other company or other organization retained to perform any of the work required by this Consent Decree. Notwithstanding any retention of contractors, subcontractors, or agents to perform any work required under this Consent Decree, the Settling Defendants shall be responsible for ensuring that all work is performed in accordance with the requirements of this Consent Decree. In any action to enforce this Consent Decree, the Settling Defendants shall not assert as a defense the failure of their officers, directors, employees, servants, agents, or contractors to take actions necessary to comply with this Consent Decree, unless it is determined to be a Force Majeure Event and satisfies the Force Majeure provisions of this Consent Decree.

III. DEFINITIONS

5. A "30-day Rolling Average Emission Rate" shall be determined by calculating an arithmetic average of all hourly emission rates in lbs/MMBtu for the current Operating Day and the previous 29 Operating Days. A new 30-day Rolling Average Emission Rate shall be calculated for each new Operating Day. Each 30-day Rolling Average Emission Rate shall include all start-up, shutdown and Malfunction periods within each Operating Day. A Malfunction shall be excluded from this Emission Rate, however, if it is determined to be a Force Majeure Event and satisfies the Force Majeure provisions of this Consent Decree. The reference methods for determining SO_2 and NO_x Emission Rates shall be those specified in 40 C.F.R. Part 75, Appendix F.

6. A "30-day Rolling Average Removal Efficiency" means the percent reduction in the mass of a pollutant achieved by a Unit's pollution control device over a 30-Operating Day period. This percentage shall be calculated by subtracting the Unit's outlet 30-day Rolling Average Emission Rate from the Unit's inlet 30-day Rolling Average Emission Rate, dividing that difference by the Unit's inlet 30-day Rolling Average Emission Rate, and then multiplying by 100. A new 30-day Rolling Average Removal Efficiency shall be calculated for each new Operating Day, and shall include all start-up, shutdown and Malfunction periods with each Operating Day. A Malfunction shall be excluded from this Removal Efficiency, however, if it is determined to be a Force Majeure Event and satisfies the Force Majeure provisions of this Consent Decree. The reference method for determining both the inlet and outlet 30-day Rolling Average Emission Rate, for the purposes of calculating the SO_2 30-day Rolling Average Removal Efficiency, shall be that specified in 40 C.F.R. Part 75, Appendix F.

7. "CEMS" or "Continuous Emission Monitoring System," means, for obligations involving NO_x and SO_2 under this Consent Decree, the devices defined in 40 C.F.R. § 72.2, and installed and maintained as required by 40 C.F.R. Part 75.

8. "Clean Air Act" or "Act" means the federal Clean Air Act, 42 U.S.C. §§7401-7671q, and its implementing regulations.

9. "Consent Decree" means this Consent Decree.

10. "Emission Rate" for a given pollutant means the number of pounds of that pollutant emitted per million British thermal units of heat input (lb/MMBtu), measured in accordance with this Consent Decree.

11. "EPA" means the United States Environmental Protection Agency.

12. "ESP" means electrostatic precipitator, a pollution control device for the reduction of PM.

13. "Flue Gas Desulfurization System" or "FGD" means a pollution control device that employs flue gas desulfurization technology, including an absorber utilizing lime, flyash, or limestone slurry, for the reduction of sulfur dioxide emissions.

14. "Fossil Fuel" means any hydrocarbon fuel, including coal, petroleum coke, petroleum oil, or natural gas.

15. "lb/MMBtu" means one pound of a pollutant per million British thermal units of heat input.

16. "Malfunction" means malfunction as that term is defined under 40 C.F.R. § 60.2 (July 1, 2004).

17. "MW" means a megawatt or one million Watts.

18. "Milton R. Young Station" means, for purposes of this Consent Decree only, the Settling Defendants' electric generating Units near Center, North Dakota, which currently consist of two lignite-fired cyclone units. Unit 1 has a nominal net rating of 235 MW. Unit 2 has a nominal net rating of 440 MW. "Milton R. Young Station" also includes the Settling Defendants' proposed Unit 3, with a proposed net rating of 600 MW. The Settling Defendants anticipate submitting a permit to construct application on or before June 1, 2009. Subject to NDDH's permit to construct review process, the Unit 3 permit is anticipated to be issued by December 31, 2010, construction is expected to commence on or before December 31, 2012, and operation is expected to commence on or before December 31, 2015.

19. "NDDH" shall mean the North Dakota Department of Health.

20. "Netting" shall mean the process of determining whether a particular physical change or change in the method of operation of a major stationary source results in a net emissions increase, as that term is defined at 40 C.F.R. § 52.21(b)(3)(i) and Chapter 33-15-15 of the North Dakota Administrative Code (Feb. 1, 2005).

21. "NO_x" means oxides of nitrogen, measured in accordance with the provisions of this Consent Decree.

22. "NO_x Allowance" means an authorization or credit to emit a specified amount of NO_x that is allocated or issued under an emissions trading or marketable permit program of any kind established under the Act or a State Implementation Plan. The Parties acknowledge that at the time of lodging of this Consent Decree that no NO_x Allowance program is applicable to Milton R. Young Station.

23. "NO_x BACT Determination" shall mean the conclusions made by the NDDH as a result of reviewing the NO_x Top-Down BACT Analysis. Such determination shall be carried out in accordance with the applicable federal and state statutes, regulations, and guidance cited in the definition of "NO_x Top-Down BACT Analysis," below, and shall include the selection of control technology to be installed on Units 1 and 2 and 30-day Rolling Average Emission Rates applicable to Units 1 and 2 and to be continuously complied with by the Settling Defendants.

24. "NO_x Top-Down BACT Analysis" shall mean a study prepared by the Settling Defendants to identify the emission limits required by 42 U.S.C. § 7475(a)(4) and 40 C.F.R. § 52.21(j)(3), defined by 42 U.S.C. § 7479(3) and 40 C.F.R. §52.21(b)(12), and expressed as a 30-Day Rolling Average NO_x Emission Rate. The study shall be carried out in accordance with the provisions of Chapter B of EPA's "New Source Review Workshop Manual—Prevention of

Significant Deterioration and Nonattainment Area Permitting," (Draft October 1990) ("EPA's NSR Manual"). The study shall not include any other elements of PSD permitting required by other chapters of EPA's NSR Manual (notwithstanding any cross-reference in Chapter B to such other chapters), 40 C.F.R. § 52.21, or N.D. ADMIN. CODE § 33-15-15-01.2.

25. "Over-fire Air" means a technology to reduce NO_x formation in a Unit boiler by directing a portion of the air to be combusted through ports above the level of the cyclones in the furnace.

26. "Operating Day" means any calendar day on which a Unit fires fossil fuel.

27. "Parties" means the United States of America, the State of North Dakota, and the Settling Defendants. "Party" means one of the four named "Parties."

28. "Plant-Wide 12-Month Rolling Average Tonnage" means the sum of the tons of the pollutant in question emitted from the Milton R. Young Station in the most recent complete month and the previous eleven (11) months. A new Plant-Wide 12-Month Rolling Average Tonnage shall be calculated for each new complete month in accordance with the provisions of this Consent Decree. The calculation of each Plant-Wide 12-Month Rolling Average Tonnage shall include the pollutants emitted during periods of startup, shutdown, and Malfunction within each calendar month, unless the Malfunction event is also deemed a "Force Majeure Event" as defined in Section XIV of this Consent Decree (Force Majeure), in which case such emissions shall be excluded.

29. "Plant-Wide Tonnage for One Calendar Year" means the sum of the tons of the pollutant in question emitted from the Milton R. Young Station in any 12-Month calendar year. A new Plant-Wide Tonnage for One Calendar Year shall be calculated for each new calendar

year. The calculation of each Plant-Wide Tonnage for One Calendar Year shall include the pollutants emitted during periods of startup, shutdown, and Malfunction within each 12-Month calendar year, unless the Malfunction event is also deemed a "Force Majeure Event" as defined in Section XIV of this Consent Decree (Force Majeure), in which case such emissions shall be excluded.

30. "Plant-Wide Tonnage for the Annual Average of Two Calendar Years" means the sum of the tons of the pollutant in question emitted from the Milton R. Young Station in any two consecutive 12-month calendar years, divided by two. A new Plant-Wide Tonnage for the Annual Average of Two Calendar Years shall be calculated for each new complete 12-month calendar year. The calculation of each Plant-Wide Tonnage for the Annual Average of Two Calendar Years shall include the pollutants emitted during periods of startup, shutdown, and Malfunction within each 12-Month calendar year, unless the Malfunction event is also deemed a "Force Majeure Event" as defined in Section XIV of this Consent Decree (Force Majeure), in which case such emissions shall be excluded.

31. "PM" means total particulate matter, measured in accordance with the provisions of this Consent Decree.

32. "PM CEMS" or "PM Continuous Emission Monitoring System" means, as specified in Section VI (PM Emission Reduction and Controls) of this Consent Decree, the equipment that samples, analyzes, measures, and provides, by readings taken at frequent intervals, an electronic or paper record of PM emissions.

33. "PM Emission Rate" means the average number of pounds of PM emitted per million British thermal units of heat input ("lbs/MMBtu") from the Unit stack, as measured in an annual

stack test from the Unit stack, in accordance with the reference method set forth in 40 C.F.R. Part 60, Appendix A, Method 5 (filterable portion only) or Method 17 (filterable portion only).

34. "Prevention of Significant Deterioration" or "PSD" means the prevention of significant deterioration of air quality program under Part C of Subchapter I of the Clean Air Act, 42 U.S.C. §§ 7470 - 7492, and 40 C.F.R. Part 52.

35. "Project Dollars" means the Settling Defendants' expenditures and payments incurred or made in carrying out the Projects identified in Section VIII (Additional Injunctive Relief) of this Consent Decree to the extent that such expenditures or payments both: (a) comply with the requirements set forth in Section VIII (Additional Injunctive Relief) of this Consent Decree; and (b) constitute (i) the Settling Defendants' direct payments for such projects, (ii) the Settling Defendants' external costs for contractors, vendors, and equipment, (iii) the Settling Defendants' internal costs consisting of employee time, travel, or out-of-pocket expenses specifically attributable to these particular projects and documented in accordance with Generally Accepted Accounting Principles ("GAAP"), or (iv) the discounted present value of the cash payments made by the Settling Defendants under a contract with another entity to carry out the project.

36. "Rich Reagent Injection" means a technology that injects reagent, such as ammonia or urea, into a Unit boiler to react with and reduce NO_x emissions.

37. "Selective Catalytic Reduction" means a pollution control device for reducing NO_x emissions through the use of selective catalytic reduction technology.

38. "Selective Non-Catalytic Reduction" means a pollution control device for reducing NO_x emissions through the use of selective non-catalytic reduction technology.

39. "Settling Defendants" means Minnkota Power Cooperative, Inc., and Square Butte Electric Cooperative.

40. "SO_2" means sulfur dioxide, measured in accordance with the provisions of this Consent Decree.

41. "SO_2 Allowance" means "allowance" of SO_2 as defined at 42 U.S.C. § 7651a(3): "an authorization, allocated to an affected Unit by the Administrator of EPA under Subchapter IV of the Act, to emit, during or after a specified calendar year, one ton of sulfur dioxide."

42. "Title V Permit" means the permit required of the Settling Defendants' major sources under Subchapter V of the Act, 42 U.S.C. §§ 7661-7661e.

43. "Unit" means, for the purposes of this Consent Decree, collectively, the coal crusher, stationary equipment that feeds coal to the boiler, the boiler that produces steam for the steam turbine, the steam turbine, the generator, the equipment necessary to operate the generator, steam turbine and boiler, and all ancillary equipment, including pollution control equipment and systems necessary for the production of electricity. An electric utility steam generating station may comprise one or more Units.

IV. SO_2 EMISSION REDUCTIONS AND CONTROLS

A. SO_2 Emission Controls

1. New FGD Installations at Milton R. Young Station Unit 1

44. No later than December 31, 2010, the Settling Defendants shall elect to install either a wet FGD or a dry FGD (or equivalent SO_2 control technology approved pursuant to Paragraph 46) at Unit 1, and shall notify the Plaintiffs in writing as to which option the Settling Defendants have elected for this Unit.

45. Beginning no later than December 31, 2011, the Settling Defendants shall install and commence continuous operation of the FGD (or equivalent SO_2 control technology approved pursuant to Paragraph 46) elected above on Unit 1, and shall achieve and thereafter maintain:

a. If the Settling Defendants elect to install a wet FGD, a 30-Day Rolling Average Removal Efficiency for SO_2 at Unit 1 of at least ninety-five percent (95%), subject to the provisions of Paragraph 49;

b. If the Settling Defendants elect to install a dry FGD, a 30-Day Rolling Average Removal Efficiency for SO_2 at Unit 1 of at least ninety percent (90%).

46. With prior written notice to and written approval from EPA and the State, the Settling Defendants may, in lieu of installing and operating an FGD at Unit 1, install and operate an alternative SO_2 control technology at this Unit that achieves and maintains a 30-Day Rolling Average Removal Efficiency for SO_2 of at least ninety five percent (95%), unless Defendants demonstrate, and Plaintiffs agree, that the alternative control technology will provide significant additional multi-pollutant reductions, in which case Settling Defendant shall achieve and maintain a 30-Day Rolling Average Removal Efficiency for SO_2 of at least ninety percent (90%).

2. <u>FGD Upgrades for Milton R. Young Station Unit 2</u>

47. No later than December 31, 2010, the Settling Defendants shall design and upgrade the FGD on Unit 2. Beginning no later than this same date, the Settling Defendants shall also achieve and thereafter maintain a 30-Day Rolling Average Removal Efficiency for SO_2 at Unit 2 of at least ninety percent (90%), subject to the provisions of Paragraph 49.

3. Continuous Operation of SO_2 Controls

48. The Settling Defendants shall continuously operate each FGD (or equivalent SO_2 control technology approved pursuant to Paragraph 46) covered under this Consent Decree at all times that the Unit it serves is in operation, consistent with the technological limitations, manufacturers' specifications, and good engineering and maintenance practices for the FGDs, or equivalent technology, for minimizing emissions to the extent practicable. The Settling Defendants need not operate an FGD system during periods of Malfunction of the FGD, or during periods of Malfunction of the Unit that have a significant adverse impact on the operation of the FGD, provided that the Settling Defendants satisfy the requirements for a Malfunction as set forth in Paragraph 138 (Malfunctions). As set forth in Paragraph 138, a Malfunction may also constitute a Force Majeure Event if it meets the requirements for a Force Majeure Event in Section XIV (Force Majeure) of this Consent Decree.

4. Maximizing SO_2 Emission Reductions while Minimizing Ice Formation During Wintertime Operations of FGDs

49. In light of the potential for substantial and dangerous ice formation on emission stacks utilizing wet FGDs as a result of the particularly severe winter weather conditions in North Dakota, the Settling Defendants shall, by December 31, 2006, submit to EPA and NDDH for review and approval an evaluation of technologies and best management practices for minimizing and eliminating ice formation on the stacks while minimizing any effect on emission reductions at any Units served or to be served by a wet FGD. Such evaluation shall be performed by an independent contractor, and shall include an analysis of the feasibility, effectiveness, reliability, energy impacts, and economic costs of such technologies and best management practices. In their submittal, the Settling Defendants shall evaluate such

technologies and best management practices, and shall propose either available technologies, best management practices, or both.

a. Upon EPA's and NDDH's approval of the Settling Defendants' evaluation, EPA and NDDH shall provide the Settling Defendants with a written determination regarding an available technology and best management practices. Within 90 days after the installation or upgrade of a wet FGD pursuant to this Consent Decree, the Settling Defendants shall commence implementation of EPA's and NDDH's determination, subject to the Dispute Resolution procedures set forth in Paragraphs 139 through 146 of this Consent Decree.

b. The Settling Defendants shall include in the periodic compliance reports required pursuant to Section XI (Periodic Reporting) of this Consent Decree, a summary of the effectiveness of any technologies and best management practices in minimizing and eliminating ice formation on the stacks while minimizing any effect on emission reductions at any Units served by a wet FGD at the Milton R. Young Unit 2.

B. Tonnage Limits for SO_2 Emissions

50. The Settling Defendants shall comply with the following SO_2 emission limitations for the Milton R. Young Station:

a. Beginning January 1, 2006, the Settling Defendants shall not emit more than 31,000 tons of SO_2 per year based on a Plant-Wide Tonnage for the Annual Average of Two Calendar Years;

b. Beginning January 1, 2011, the Settling Defendants shall not emit more than 26,000 tons of SO_2 per year based on a Plant-Wide Tonnage for One Calendar Year;

c. Beginning January 1, 2012, and each year thereafter, the Settling Defendants shall not emit more than 11,500 tons of SO_2 per year based on a Plant-Wide Tonnage for the Annual Average of Two Calendar Years; and

d. In the event that Milton R. Young Unit 3 is not operational by December 31, 2015, then beginning January 1, 2014, and each year thereafter, the Settling Defendants shall not emit more than 8,500 tons of SO_2 per year based on a Plant-Wide Tonnage for the Annual Average of Two Calendar Years.

51. Beginning on the date of entry of this Consent Decree, and prior to the Settling Defendants' implementation of EPA's and NDDH's determination pursuant to Paragraph 49, above, the Settling Defendants shall continue to implement practices, to the extent practicable, to minimize and eliminate ice formation on the stacks while minimizing any effect on emission reductions at Milton R. Young Unit 2.

52. Notwithstanding the foregoing, the Settling Defendants may submit to EPA and NDDH a petition for a higher SO_2 emissions limitation than the 31,000 ton and 26,000 ton limits noted in Subparagraphs 50(a) and (b), above, if the Settling Defendants can demonstrate that they are unable to comply with such limitation given the energy demands of their cooperative, and despite utilization of best management practices and operation of the Milton R. Young Unit

2 FGD to minimize SO_2 emissions to the maximum extent practicable. EPA's and NDDH's disapproval of any such petition shall be subject to the dispute resolution provisions in Section XV (Dispute Resolution) of this Consent Decree.

53. The Settling Defendants shall not use SO_2 Allowances or credits to comply with the SO_2 emissions limitations set forth in Paragraph 50.

C. Surrender of SO_2 Allowances

54. For purposes of this Subsection, the "surrender of allowances" means permanently surrendering allowances from the accounts administered by EPA for Units 1 and 2—and from Unit 3 to the extent that SO_2 Allowances are allocated by EPA to that Unit – so that such SO_2 Allowances can never be used to meet any compliance requirement under the Clean Air Act, the North Dakota State Implementation Plan, or this Consent Decree.

55. For each year specified below, the Settling Defendants shall surrender to EPA, or transfer to a non-profit third party selected by the Settling Defendants for surrender, SO_2 Allowances that have been allocated to the Milton R. Young Station for the specified calendar year:

Calendar Year	Amount
2012-2015	4,346 Allowances
2016-2018	8,693 Allowances
2019	12,170 Allowances
2020 and thereafter	14,886 Allowances if Milton R. Young Units 1, 2, and 3 (as proposed) are operational by December 31, 2015, and 17,886 Allowances if only Milton R. Young Units 1 and 2 are operational by December 31, 2015

The Settling Defendants shall make such surrender annually, within forty-five (45) days of their receipt from EPA of the Annual Deduction Reports for SO_2. Any surrender need not include the specific SO_2 Allowances that were allocated to the Settling Defendants, so long as the Settling Defendants surrender SO_2 Allowances that are from the same year or an earlier year and that are equal to the number required to be surrendered under this Paragraph. The requirements in this Subsection (IV(C)) of the Consent Decree pertaining to the Settling Defendants' use and retirement of SO_2 Allowances are permanent injunctions not subject to any termination provision of this Decree.

56. If any SO_2 Allowances are transferred directly to a non-profit third party, the Settling Defendants shall include a description of such transfer in the next report submitted to EPA and NDDH pursuant to Section XI (Periodic Reporting) of this Consent Decree. Such report shall: (i) provide the identity of the non-profit third-party recipient(s) of the SO_2 Allowances and a listing of the serial numbers of the transferred SO_2 Allowances; and (ii) include a certification by the third-party recipient(s) stating that the recipient(s) will not sell, trade, or otherwise exchange any of the allowances and will not use any of the SO_2 Allowances to meet any obligation imposed by any environmental law. No later than the third periodic report due after the transfer of any SO_2 Allowances, the Settling Defendants shall include a statement that the third-party recipient(s) surrendered the SO_2 Allowances for permanent surrender to EPA in accordance with the provisions of Paragraphs 54 and 55 within one (1) year after the Settling Defendants transferred the SO_2 Allowances to them. The Settling Defendants shall not have complied with the SO_2 Allowance surrender requirements of this Paragraph until all third-party recipient(s) shall have actually surrendered the transferred SO_2 Allowances to EPA.

57. For all SO_2 Allowances surrendered to EPA, the Settling Defendants or the third-party recipient(s) (as the case may be) shall first submit an SO_2 Allowance transfer request form to EPA's Office of Air and Radiation's Clean Air Markets Division directing the transfer of such SO_2 Allowances to the EPA Enforcement Surrender Account or to any other EPA account that EPA may direct in writing. As part of submitting these transfer requests, the Settling Defendants or the third-party recipient(s) shall irrevocably authorize the transfer of these SO_2 Allowances and identify – by name of account and any applicable serial or other identification numbers or station names – the source and location of the SO_2 Allowances being surrendered.

D. General SO_2 Provisions

58. In determining Emission Rates for SO_2, the Settling Defendants shall use CEMS in accordance with those reference methods specified in 40 C.F.R. Part 75.

59. For the purpose of calculating the 30-Day Rolling Average Removal Efficiency, the outlet SO_2 Emission Rate and the inlet SO_2 Emission Rate shall be determined based on the data generated in accordance with 40 C.F.R. Part 75 (using SO_2 CEMS data from both the inlet and outlet of the control device).

60. If any Unit subject to this Consent Decree is constructed to allow any flue gas to by-pass the SO_2 pollution control equipment, the outlet 30-Day Rolling Average Emission Rate shall be determined from SO_2 CEMS located after the by-pass return, and the inlet 30-Day Rolling Average Emission Rate shall be determined from SO_2 CEMS located before the by-pass.

V. NOx EMISSION REDUCTIONS AND CONTROLS

A. Phase I NO_x Emissions Reductions and Controls

61. No later than December 31, 2007, the Settling Defendants shall install and commence continuous operation of Over-fire Air on Unit 2 at the Milton R. Young Station.

62. No later than December 31, 2009, the Settling Defendants shall install and commence continuous operation of Over-fire Air on Unit 1 at the Milton R. Young Station.

63. With prior written notice to and written approval from EPA and NDDH, the Settling Defendants may, in lieu of installing and operating the NO_x controls required by Paragraphs 61 or 62, install and operate equivalent technology that will achieve a NO_x emission rate of no greater than 0.36 lb/MMBtu based on a 30-Day Rolling Average Emission Rate.

B. Phase II NO_x Emissions Reductions and Controls

64. The Phase II 30-Day Rolling Average NO_x Emission Rates shall be determined in accordance with the procedures set forth in this subsection.

65. Within six months after entry of this Consent Decree, the Settling Defendants shall submit to NDDH for review and approval, and to EPA for review, a NO_x Top-Down BACT Analysis for each existing coal-fired Unit at the Milton R. Young Station. The Settling Defendants' NO_x Top-Down BACT Analysis shall include all information necessary for NDDH to make a BACT Determination, and any additional information requested by EPA and NDDH. The Settling Defendants' NO_x Top-Down BACT Analysis shall include an evaluation of Selective Catalytic Reduction, Selective Non-Catalytic Reduction, Over-fire Air, and Rich Reagent Injection, as well as other NO_x control technologies. This NO_x Top-Down BACT Analysis is independent and separate from the Settling Defendants' plans to install one or more

technologies pursuant to Paragraphs 61 and 62. The Settling Defendants shall retain a qualified contractor to assist in the performance and completion of each NO_x Top-Down BACT Analysis.

66. NDDH shall review the Settling Defendants' NO_x Top-Down BACT Analysis, and shall develop its BACT Determination, in accordance with applicable federal and state statues, regulations, and guidance, including those cited in the definition of a NO_x Top-Down BACT Analysis under this Consent Decree. After consultation with EPA, NDDH shall provide to the Parties its BACT Determination for NO_x emissions from each existing coal-fired Unit at the Milton R. Young Station. NDDH's BACT Determination shall include for each Unit the specific control technologies to be installed and a specific Phase II 30-Day Rolling Average NO_x Emission Rate limitation (lbs/MMBtu). NDDH's BACT Determination shall also address specific NO_x emission limitations during Unit startups. NDDH's BACT Determination shall be subject to the Dispute Resolution procedures set forth in Paragraph 147 of this Consent Decree.

67. Beginning no later than December 31, 2010, the Settling Defendants shall achieve and maintain the Phase II 30-Day Rolling Average NO_x Emission Rates established by NDDH through its NO_x BACT Determination for Unit 2. Beginning no later than December 31, 2011, the Settling Defendants shall achieve and maintain the Phase II 30-Day Rolling Average NO_x Emission Rates established by NDDH through its NO_x BACT Determination for Unit 1. Such Phase II 30-Day Rolling Average NO_x Emission Rates shall not affect the Settling Defendants' obligation to also comply with the Phase I 30-Day Rolling Average NO_x Emission Rates set forth herein.

C. Use of NO_x Allowances

68. Except as provided in this Consent Decree, the Settling Defendants shall not sell or

trade any surplus NO_x Allowances allocated to Units 1, 2, and 3 at the Milton R. Young Station that would otherwise be available for sale or trade as a result of the actions taken by the Settling Defendants to comply with the requirements of this Consent Decree.

69. The number of NO_x Allowances that are surplus to the Settling Defendants' NO_x Allowance-holding requirements shall be equal to the amount by which the NO_x Allowances allocated to the Settling Defendants' Units 1, 2, and 3 at the Milton R. Young Station for a particular year are greater than the total amount of NO_x emissions from those same Units for the same year.

70. Provided that the Settling Defendants are in compliance with the NO_x emission limitations of this Consent Decree, nothing in this Consent Decree shall preclude the Settling Defendants from selling or transferring NO_x Allowances allocated to the Milton R. Young Station that become available for sale or trade as a result of:

a. activities that reduce NO_x emissions from any Unit at the Milton R. Young Station prior to the date of entry of this Consent Decree;

b. the installation and operation of any NO_x pollution control technology or technique that is not otherwise required under this Consent Decree;

c. achievement and maintenance of NO_x emission rates below the emission limits required by Section V (NO_x Emissions Reductions and Controls);

d. permanent shutdown of any Unit at the Milton R. Young Stations not otherwise required by this Consent Decree; and

e. other emission reduction measures that are agreed to by the Parties and made enforceable through modifications of this Consent Decree;

so long as the Settling Defendants timely report the generation of such surplus NO_x Allowances in accordance with Section XI (Periodic Reporting) of this Consent Decree. The Settling Defendants shall be allowed to sell or transfer NO_x Allowances equal to the NO_x emissions reductions achieved for any given year by any of the actions specified in Subparagraphs (b) through (e) only to the extent that the total NO_x emissions from all Units at the Milton R. Young Station are below the emissions limits required by this Consent Decree.

71. The Settling Defendants may not purchase or otherwise obtain NO_x Allowances from another source for purposes of complying with the requirements of this Consent Decree. However, nothing in this Consent Decree shall prevent the Settling Defendants from purchasing or otherwise obtaining NO_x Allowances from another source for purposes of complying with state or federal Clean Air Act requirements to the extent otherwise allowed by law.

D. General NO_x Provisions

72. In determining Emission Rates for NO_x, the Settling Defendants shall use CEMS in accordance with the reference methods specified in 40 C.F.R. Part 75.

73. At any time following the commencement of operation of the specific NO_x control technologies required by the NDDH's NO_x BACT Determination, the Settling Defendants may petition the Plaintiffs to revise the applicable Phase II 30-Day Rolling Average Emission Rate for NO_x. In their petition, the Settling Defendants shall demonstrate and explain why they cannot consistently achieve and maintain the 30-Day Rolling Average Emission NO_x Rate required by the NDDH's NO_x BACT Determination for the Unit in question, considering all relevant information. The Settling Defendants shall include in such petition a proposed

alternative 30-Day Rolling Average Emission Rate for NO_x. The Settling Defendants shall also retain a qualified contractor to assist in the preparation and completion of the petition for an alternative 30-Day Rolling Average Emission Rate for NO_x. The Settling Defendants shall provide with each petition all pertinent documents and data. If the Plaintiffs disapprove the alternative 30-Day Rolling Average Emission Rate for NO_x proposed by the Settling Defendants, such disapproval shall be subject to the provisions of Section XV (Dispute Resolution) of this Consent Decree. The Settling Defendants shall submit any petition for any Unit under this Paragraph no later than six (6) months after the final compliance date specified for that Unit in Paragraph 67.

74. The Settling Defendants shall continuously operate all NO_x control technology installed on the Milton R. Young Units at all times that the Unit served is in operation, consistent with the technological limitations, manufacturers' specifications to the extent practicable, and good engineering and maintenance practices for the NO_x control technology. The Settling Defendants need not operate NO_x control technology during periods of Malfunction of the NO_x control technology, or during periods of Malfunction of the Unit that have a significant adverse impact on the operation of the NO_x control technology, provided that the Settling Defendants satisfy the requirements for Malfunction Events as set forth in Paragraph 138 (Malfunction Events). As set forth in Paragraph 138, a Malfunction may also constitute a Force Majeure Event if it meets the requirements for a Force Majeure Event in Section XIV (Force Majeure) of this Consent Decree.

VI. PM EMISSION REDUCTIONS AND CONTROLS

A. Optimization of PM Emission Controls

75. Within ninety (90) days after entry of this Consent Decree and continuing thereafter, the Settling Defendants shall continuously operate each PM Control Device on the Milton R. Young Station Units to maximize PM emission reductions, consistent with the operational and maintenance limitations of the units. Specifically, the Settling Defendants shall, at a minimum: (a) energize each section of the ESP for each Unit, regardless of whether that action is needed to comply with opacity limits; (b) maintain the energy or power levels delivered to the ESP for each Unit to achieve the greatest possible removal of PM; (c) make best efforts to expeditiously repair and return to service transformer-rectifier sets when they fail; (d) inspect for, and schedule for repair, any openings in ESP casings and ductwork to minimize air leakage; (e) optimize for Unit 1 the plate-cleaning and discharge-electrode cleaning systems for the ESP by varying the cycle time, cycle frequency, rapper-vibrator intensity, and number of strikes per cleaning event; and (f) optimize for Unit 2 the plate-cleaning system for the ESP by varying the cycle time and frequency of the cycle.

B. Compliance with PM Emission Limits

76. Within one year of entry of the Consent Decree, and continuing annually thereafter, the Settling Defendants shall demonstrate, in accordance with Paragraphs 80 and 81, that Unit 2 at the Milton R. Young Station can achieve and thereafter maintain a PM Emission Rate of no greater than 0.030 lb/MMBtu.

77. No later than one-hundred-eighty (180) days after the Settling Defendants install and commence continuous operation of the FGD (or equivalent SO_2 control technology approved pursuant to Paragraph 46) on Unit 1 at the Milton R. Young Station, and continuing annually thereafter, the Settling Defendants shall demonstrate, in accordance with Paragraphs 80 and 81,

that Unit 1 at the Milton R. Young Station can achieve and thereafter maintain a PM Emission Rate of:

a. No greater than 0.030 lb/MMBtu if the Settling Defendants install a wet FGD; and

b. No greater than 0.015 lb/MMBtu if the Settling Defendants install a dry FGD.

78. The Settling Defendants shall continuously operate each ESP or baghouse at the Milton R. Young Station at all times that each Unit the ESP or baghouse serves is combusting Fossil Fuel, consistent with good engineering practices for PM control, to minimize PM emissions to the extent practicable. The Settling Defendants need not operate an ESP or baghouse during periods of Malfunction of the ESP or baghouse, or during periods of Malfunction of the Unit that have a significant adverse impact on the operation of the ESP or baghouse, provided that the Settling Defendants satisfy the requirements for Malfunction Events as set forth in Paragraph 138 (Malfunction Events). As set forth in Paragraph 138, a Malfunction may also constitute a Force Majeure Event if it meets the requirements for a Force Majeure Event in Section XIV (Force Majeure) of this Consent Decree.

79. Within 180 days after the Settling Defendants complete the installation of any equipment required by Paragraphs 76 and 77, the Settling Defendants shall conduct a performance test demonstration to ensure that the PM emission limitation set forth in Paragraphs 76 and 77 can be consistently achieved in practice, including all requirements pertaining to proper operation and maintenance of control equipment. If the performance demonstration shows that the control equipment cannot consistently meet the required PM emission limitation, the Settling Defendants shall submit a report to EPA and NDDH proposing alternative emission

limits.

C. PM Monitoring

1. PM Stack Tests

80. Beginning in calendar year 2006, and continuing annually thereafter, the Settling Defendants shall conduct PM performance testing on Milton R. Young Station Units 1 and 2. Such annual performance tests may be satisfied by stack tests conducted in a given year, in accordance with the Settling Defendants' permit from the State of North Dakota.

81. In determining the PM Emission Rate, the Settling Defendants shall use the reference methods specified in 40 C.F.R. Part 60, App. A, Method 5 (filterable portion only) or 40 C.F.R. Part 60, App. A, Method 17 (filterable portion only), using stack tests, or alternative methods that are requested by the Settling Defendants and approved by EPA. The Settling Defendants shall also calculate the PM Emission Rates from annual stack tests in accordance with 40 C.F.R. § 60.8(f). In addition, the Settling Defendants shall submit the results of each PM stack test to NDDH and EPA within forty-five (45) days of completion of each test.

2. PM CEMS

82. The Settling Defendants shall install and operate PM CEMS in accordance with Paragraphs 82 through 88 on Unit 2 at the Milton R. Young Station. The PM CEMS shall comprise a continuous particle mass monitor measuring particulate matter concentration, directly or indirectly, on an hourly average basis and a diluent monitor used to convert the concentration to units of lb/MMBtu. The Settling Defendants shall maintain, in an electronic database, the hourly average emission values of all PM CEMS in lb/MMBtu. The Settling Defendants shall use reasonable efforts to keep the PM CEMS running and producing data whenever Unit 2 is

operating.

83. No later than six (6) months after entry of this Consent Decree, the Settling Defendants shall submit to EPA and NDDH for review and approval pursuant to Section XII (Review and Approval of Submittals) of this Consent Decree a plan for the installation and certification of the PM CEMS for Milton R. Young Unit 2.

84. No later than one hundred twenty (120) days prior to the deadline to commence operation of the PM CEMS, the Settling Defendants shall submit to EPA and NDDH for review and approval pursuant to Section XII (Review and Approval of Submittals) of this Consent Decree a proposed Quality Assurance/Quality Control ("QA/QC") protocol that shall be followed in calibrating such PM CEMS. Following EPA and NDDH's approval of the protocol, the Settling Defendants shall thereafter operate the PM CEMS in accordance with the approved protocol.

85. In developing both the plan for installation and certification of the PM CEMS and the QA/QC protocol, the Settling Defendants shall use the criteria set forth in EPA's Amendments to Standards of Performance for New Stationary Sources: Monitoring Requirements, 69 Fed. Reg. 1786 (January 12, 2004).

86. The Settling Defendants shall install and commence operation of PM CEMS on or before June 30, 2008.

87. By December 31, 2008, the Settling Defendants shall conduct tests and demonstrate compliance with the PM CEMS installation and certification plan submitted to and approved by EPA and NDDH in accordance with Paragraphs 83 and 84.

88. The Settling Defendants shall operate continuous opacity monitors on Unit 1 and

Unit 2 of the Milton R. Young Station at all times those units are in operation. However, if the Settling Defendants demonstrate that either one of these continuous opacity monitors cannot provide accurate opacity measurement due to the formation of liquid water droplets in the flue gas of a stack with a wet FGD, in accordance with Question 5.6, Part 75 of EPA's Emission Monitoring Policy Manual, then the Settling Defendants may submit to EPA and NDDH for review and approval alternative opacity procedures and requirements pursuant to the provisions of 40 C.F.R. § 60.13(i)(1).

VII. PROHIBITION ON NETTING CREDITS OR OFFSETS FROM REQUIRED CONTROLS

89. Emission reductions generated by the Settling Defendants to comply with the requirements of this Consent Decree shall not be considered as a creditable emission decrease for the purpose of obtaining a netting credit under the Clean Air Act's Nonattainment NSR and PSD programs. Notwithstanding the preceding sentence, the Settling Defendants may use any emission decreases of NO_x, SO_2, and PM generated under this Consent Decree at Units 1 and 2 as creditable decreases for the purpose of obtaining netting credit for these pollutants at Unit 3 under the Clean Air Act's Nonattainment NSR and PSD programs, if:

a. The Settling Defendants submit, as and addendum to its construction permit application for Unit 3, an analysis that proposes emissions limits for NO_x, SO_2, and PM that are equivalent to BACT as defined in the 42 U.S.C. § 7479(3), and NDDH issues a federally enforceable permit for Unit 3 that includes emissions limits that reflect BACT-equivalent level controls at the time of construction of the Unit, and that are at least as stringent as a 30-Day Rolling Average SO_2

Removal Efficiency of at least ninety-five percent 95% (if the Settling Defendants install a wet FGD on Unit 3) or 90% (if the Settling Defendants install a dry FGD on Unit 3), a 30-Day Rolling Average NO_x Emission Rate not greater than 0.100 lb/MMBtu, and an Emission Rate for PM of no greater than 0.015 lbs/MMBtu, provided that, at any time following the commencement of operation of this new Unit, the Settling Defendants may submit to EPA and NDDH a written petition for a higher 30-Day Rolling Average NO_x Emission Rate if the Settling Defendants can demonstrate that it cannot achieve such an emission rate on this new Unit;

b. The Settling Defendants have been and remain in full compliance with the plant-wide SO_2 tonnage limitation set forth in Paragraph 50 of this Consent Decree and NDDH has issued a federally-enforceable permit for Units 1, 2, and 3 that will limit the Plant-Wide Annual Average of the Tonnage for Two Calendar Years for SO_2 at those units to 11,500 tons per year commencing January 1, 2012; and

c. NDDH determines through air quality modeling submitted by the Settling Defendants in accordance with NDDH modeling protocols that the impact on either a PSD increment or on visibility in Class I Areas from the combined emissions at Units 1, 2 and 3, after the pollution control upgrades and installations required by this Consent Decree are operational, will be less than the impact from the combined emissions at Units 1 and 2 before such controls are operational.

90. Decreases in actual emissions of NO_x, SO_2, and PM generated under this Consent Decree at Units 1 and 2 qualify as contemporaneous decreases under 40 C.F.R. § 52.21(b)(3)(ii)

(July 1, 2005) for the purpose of obtaining netting credits for these pollutants at Unit 3, as long as the Settling Defendants commence construction of Unit 3 on or before December 31, 2012.

91. Nothing in this Consent Decree is intended to affect the application of Section 33-15-15-01.2 of the North Dakota Administrative Code regarding the availability of extensions on the commencement of construction for newly permitted facilities.

92. Nothing in this Consent Decree is intended to preclude the emission reductions generated under this Consent Decree from being considered by NDDH and EPA as creditable emission decreases for the purpose of attainment demonstrations submitted pursuant to Section 110 of the Act, 42 U.S.C. § 7410, or in determining impacts on NAAQS or PSD increment.

VIII. ADDITIONAL INJUNCTIVE RELIEF

93. The Settling Defendants shall implement the wind turbine project ("Project") described in this Section in compliance with the approved plans and schedules for such Project and other terms of this Consent Decree. The Settling Defendants shall submit plans for the Project to the United States for review and approval pursuant to Section XII (Review and Approval of Submittals) of this Consent Decree in accordance with the schedules set forth in this Section. In implementing the Project, the Settling Defendants shall spend no less than $5.0 million in funds ("Project Dollars") pursuant to the schedule set forth in Paragraph 103. The Settling Defendants shall maintain, and present to the United States, upon request, all documents to substantiate the Project Dollars expended and shall provide these documents to the United States and NDDH within thirty (30) days of a request by the United States or NDDH for the documents.

94. The Settling Defendants shall make all plans and reports prepared by the Settling

Defendants pursuant to the requirements of this Section of the Consent Decree publicly available without charge.

95. The Settling Defendants shall certify, as part of the plan submitted to the United States for the Project that, as of the date of this Consent Decree, the Settling Defendants are not otherwise required by law to perform the Project described in the plan, that the Settling Defendants are unaware of any other person who is required by law to perform the Project, and that the Settling Defendants will not use the Project, or portion thereof, to satisfy any obligations that it may have under other applicable requirements of law.

96. The Settling Defendants shall use good faith efforts to secure as much benefit as possible for the Project Dollars expended, consistent with the applicable requirements and limits of this Consent Decree.

97. Regardless of whether the Settling Defendants elected (where such election is allowed) to undertake the Project by itself or to do so by contributing funds to another person or instrumentality that will carry out the Project, the Settling Defendants acknowledge that they will receive credit for the expenditure of such funds as Project Dollars only if the Settling Defendants demonstrate that the funds have been actually spent by either the Settling Defendants or by the person or instrumentality receiving them (or, in the case of internal costs, have actually been incurred by the Settling Defendants), and that such expenditures met all requirements of this Consent Decree.

98. The Settling Defendants shall receive full credit for their expenditures only to the extent that they do not receive an offsetting financial or economic benefit from such expenditures; in determining how many Project Dollars have been spent by the Settling

Defendants, the Settling Defendants shall debit any such offsetting financial or economic benefit received against any of the Settling Defendants' expenditures for the Project.

99. Within sixty (60) days following the completion of the Project required under this Consent Decree, the Settling Defendants shall submit to the United States a report that documents the date that the Project was completed, the Settling Defendants' results of implementing the Project, including the emission reductions or other environmental benefits achieved, and the Project Dollars expended by the Settling Defendants in implementing the Project.

100. The Settling Defendants shall not financially benefit to a greater extent than any other member of the general public from the sale or transfer of technology obtained in the course of implementing any Project.

101. Project Dollar credit given for the Project shall reflect the Settling Defendants' net cost in implementing the Project, and any economic benefit or income resulting from the Project shall be deducted from the Project Dollar credit given to the Project.

102. Beginning one (1) year after entry of this Consent Decree, the Settling Defendants shall provide the United States with semi-annual updates concerning the progress of the Project.

103. Within 180 days after entry of this Consent Decree, the Settling Defendants shall submit a plan to EPA and the State for a Project to provide their members with electricity generated from wind turbines. The Project shall require the Settling Defendants to either (a) by December 31, 2012, spend no less than $5,000,000 in Project Dollars to purchase and install its own wind turbines, or (b) by December 31, 2009, enter into a power purchase agreement with a provider of wind energy that requires the provider of wind energy to build new wind turbines by

this same date in the Settling Defendants' service territory with a capacity of approximately 5 MW, and that obligates the Settling Defendants to purchase the entire electric output from the turbines for a period of no less than 15 years. The power purchase agreement shall have a discounted present value of cash outflows of no less than $5,000,000, based on a discount rate of 6.25%.

IX. CIVIL PENALTY

104. Within thirty (30) calendar days after entry of this Consent Decree, the Settling Defendants shall pay to the United States a civil penalty in the amount of $425,000. The civil penalty shall be paid by Electronic Funds Transfer ("EFT") to the United States Department of Justice, in accordance with current EFT procedures, referencing USAO File Number 2006V0009 and DOJ Case Number 90-5-2-1-07717 and the civil action case name and case number of this action. The costs of such EFT shall be the Settling Defendants' responsibility. Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the U.S. Attorney's Office for the District of North Dakota. Any funds received after 2:00 p.m. EDT shall be credited on the next business day. At the time of payment, the Settling Defendants shall provide notice of payment, referencing the USAO File Number, the DOJ Case Number, and the civil action case name and case number, to the Department of Justice and to EPA in accordance with Section XVIII (Notices) of this Consent Decree.

105. Within thirty (30) calendar days after entry of this Consent Decree, the Settling Defendants shall pay to the State a civil penalty in the amount of $425,000. Payment shall be made in the form of a certified check or cashier's check, and be payable to "North Dakota Department of Health" Payment shall be sent to the Director, Air Quality Division, North

Dakota Department of Health, Bismark, North Dakota 58506-5520. To ensure proper credit, the check must reference *United States, et al. v. Minnkota Power Cooperative, et al.*, and the civil action case number.

106. Failure to timely pay the civil penalty shall subject the Settling Defendants to interest accruing from the date payment is due until the date payment is made at the rate prescribed by 28 U.S.C. § 1961, and shall render the Settling Defendants liable for all charges, costs, fees, and penalties established by law for the benefit of a creditor or of the United States in securing payment.

107. Payments made pursuant to this Section are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), and are not tax-deductible expenditures for purposes of federal law.

X. RESOLUTION OF CLAIMS

A. Resolution of Plaintiffs' Civil Claims

108. **Claims Based on Modifications Occurring Before the Lodging of Consent Decree.** Entry of this Consent Decree shall resolve all civil claims of the Plaintiffs under:

a. Parts C and D of Subchapter I of the Clean Air Act;

b. Section 111 of the Clean Air Act and 40 C.F.R. Part 60;

c. Sections 502(a) and 504(a) of the Clean Air Act, but only to the extent that such claims are based on the Settling Defendants' failure to obtain an operating permit that reflects applicable requirements imposed under Part C of Subchapter I of the Clean Air Act; and

d. Chapters 33-15-12 and 33-15-15 of the North Dakota Administrative Code, as

well as Chapters 33-15-01 and 33-15-14 as they relate to Chapters 33-15-12 and 33-15-15, and all relevant prior versions of these regulations;

that arose from any modification that commenced at the Milton R. Young Station prior to the date of lodging of this Consent Decree, including but not limited to modifications alleged in the Complaint filed by the Plaintiffs in this civil action.

109. **Claims Based on Modifications After the Lodging of Consent Decree.** Entry of this Decree also shall resolve all civil claims of the Plaintiffs for pollutants regulated under:

a. Parts C and D of Subchapter I of the Clean Air Act, and under regulations promulgated thereunder as of the date of lodging of this Decree; and

b. Chapter 33-15-15 of the North Dakota Administrative Code, as well as Chapter 33-15-01 and 33-15-14 as they relate to Chapter 33-15-15;

where such claims are based on a modification completed before December 31, 2015 and: i) commenced at either Unit 1 or Unit 2 at the Milton R. Young Station after lodging of this Decree; or ii) that this Consent Decree expressly directs the Settling Defendants to undertake. The term "modification" as used in this Paragraph shall have the meaning that term is given under the Clean Air Act statute as it existed on the date of lodging of this Decree.

110. Reopener. The resolution of the civil claims of the United States provided by this Subsection is subject to the provisions of Section B of this Section.

B. Pursuit of Plaintiffs' Civil Claims Otherwise Resolved

111. **Bases for Pursuing Resolved Claims.** If the Settling Defendants:

a. fail by more than ninety (90) days (which may be extended by written agreement of the Parties) to complete installation or upgrade, and

commence operation, of any emission control device, unless that failure is excused under the Force Majeure provisions of this Consent Decree; or

b. emit more SO_2 than allowed by the following tonnage limitations:

1. 31,000 tons of SO_2 based on a Plant-Wide 12-Month Rolling Average Tonnage beginning January 1, 2006;

2. 26,000 tons of SO_2 based on a Plant-Wide 12-Month Rolling Average Tonnage beginning January 1, 2011;

3. 11,500 tons of SO_2 based on a Plant-Wide 12-Month Rolling Average Tonnage beginning January 1, 2012; and

4. 8,500 tons of SO_2 per year based on a Plant-Wide 12-Month Rolling Average Tonnage beginning January 1, 2014, in the event that Milton R. Young Unit 3 is not operational by December 31, 2015;

then the Plaintiffs may pursue any claim that is otherwise covered by the covenant not to sue or to bring administrative action under Subsection A of this Section for any claims based on modifications undertaken at a Unit where the modification(s) on which such claim is based was commenced after lodging of the Consent Decree and within the five years preceding the violation or failure specified in this Paragraph.

112. **Additional Bases for Pursuing Resolved Claims for Modifications.** The Plaintiffs may also pursue claims arising from a modification (or collection of modifications) at a Unit that is otherwise covered by the covenant not to sue or to bring administrative action under Subsection A of this Section, if the modification (or collection of modifications) at the Unit on

which such claims are based (a) was commenced after lodging of this Consent Decree, and (b) individually (or collectively) increased the maximum hourly emission rate of that Unit for NO_x or SO_2 (as measured by 40 C.F.R. § 60.14 (b) and (h)) by more than ten percent (10%).

XI. PERIODIC REPORTING

113. Beginning thirty (30) days after the end of the first full calendar quarter following the entry of this Consent Decree, continuing on a semi-annual basis until December 31, 2020, and in addition to any other express reporting requirement in this Consent Decree, the Settling Defendants shall submit to EPA and the State a progress report, containing

a. all information necessary to determine compliance with this Consent Decree, including but not limited to information required to be included in the reports pursuant to Paragraphs 49, 55, 56, 70, and 99; and

b. all information indicating that the installation and commencement of operation for a pollution control device may be delayed, including the nature and cause of the delay, and any steps taken by the Settling Defendants to mitigate such delay.

114. In any periodic progress report submitted pursuant to this Section, the Settling Defendants may incorporate by reference information previously submitted under their Title V permitting requirements, provided that the Settling Defendants attach the Title V permit report (or pertinent portions of such report) and provide a specific reference to the provisions of the Title V permit report that are responsive to the information required in the periodic progress report.

115. In addition to the progress reports required pursuant to this Section, the Settling Defendants shall provide a written report to Plaintiffs of any violation of the requirements of this

Consent Decree, including exceedances of the 30-Day Rolling Average Removal Efficiencies, 30-day Rolling Average Emission Rates, PM Emission Rates, and Plant-Wide Tonnage limits within ten (10) business days of when the Settling Defendants knew or should have known of any such violation. In this report, the Settling Defendants shall explain the cause or causes of the violation and all measures taken or to be taken by the Settling Defendants to prevent such violations in the future. Exceedances of the PM Emission Rates shall be reported within forty-five (45) days of the completion of the stack test that demonstrates such non-compliance. In this report, the Settling Defendants shall explain the cause or causes of the violation and all measures taken or to be taken by the Settling Defendants to prevent such violations in the future.

116. Each Settling Defendant's report shall be signed by each of the Settling Defendant's Environmental Manager or, in his or her absence, the Settling Defendant's Vice President of Generation, or higher ranking official, and shall contain the following certification:

> This information was prepared either by me or under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my evaluation, or the direction and my inquiry of the person(s) who manage the system, or the person(s) directly responsible for gathering the information, I hereby certify under penalty of law that, to the best of my knowledge and belief, this information is true, accurate, and complete. I understand that there are significant penalties for submitting false, inaccurate, or incomplete information to the United States.

XII. REVIEW AND APPROVAL OF SUBMITTALS

117. The Settling Defendants shall submit each plan, report, or other submission to EPA and the State whenever such a document is required to be submitted for review or approval pursuant to this Consent Decree. EPA and the State, to the extent that this Consent Decree provides for joint approval with the State, may approve the submittal or decline to approve it and provide written comments. Within sixty (60) days of receiving written comments from EPA, the Settling Defendants shall either: (a) revise the submittal consistent with the written comments and provide the revised submittal for final approval to EPA and, if applicable, to the State; or (b) submit the matter for dispute resolution, including the period of informal negotiations, under Section XV (Dispute Resolution) of this Consent Decree.

118. Upon receipt of EPA's final approval of the submittal, and the State's final approval, if applicable, or upon completion of the submittal pursuant to dispute resolution, the Settling Defendants shall implement the approved submittal in accordance with the schedule specified therein.

XIII. STIPULATED PENALTIES

119. For any failure by the Settling Defendants to comply with the terms of this Consent Decree, and subject to the provisions of Sections XIV (Force Majeure) and XV (Dispute Resolution) of this Consent Decree, the Settling Defendants shall pay, within thirty (30) days after receipt of written demand to the Settling Defendants by the United States, the following stipulated penalties to the United States:

Consent Decree Violation	**Stipulated Penalty (Per day per violation, unless otherwise specified)**

a. Failure to pay the civil penalty as specified in Section IX (Civil Penalty) of this Consent Decree	$10,000
b. Failure to comply with any applicable NO_x emission rate resulting from the State's BACT determination, 30-Day Rolling Average Removal Efficiency for SO_2, or Emission Rate for PM, where the violation is less than 5% in excess of the limits set forth in this Consent Decree	$2,500
c. Failure to comply with any applicable NO_x emission rate or removal efficiency resulting from the State's BACT determination, 30-Day Rolling Average Removal Efficiency for SO_2, or Emission Rate for PM, where the violation is equal to or greater than 5% but less than 10% in excess of the limits set forth in this Consent Decree	$5,000
d. Failure to comply with any applicable NO_x emission rate or removal efficiency resulting from the State's BACT determination, 30-Day Rolling Average Removal Efficiency for SO_2, or Emission Rate for PM, where the violation is equal to or greater than 10% in excess of the limits set forth in this Consent Decree	$10,000
e. Failure to comply with the Plant-Wide Tonnage Limitations for One Calendar Year or the Plant-Wide Tonnage Limitations for the Annual Average of Two Calendar Years	$60,000 per ton per year for the first 100 tons over the limit, and $120,000 per ton per year for each additional ton over the limit
f. Failure to install, upgrade, commence operation, or continue operation of the NO_x, SO_2, and PM pollution control devices on any Unit	$10,000 during the first 30 days, $27,000 thereafter
g. Failure to install or operate CEMS as required in Paragraphs 82 through 88	$1,000
h. Failure to conduct annual performance tests of PM emissions, as required by Paragraphs 80 and 81	$1,000
i. Failure to apply for any permit required by this Consent Decree	$1,000

j. Failure to timely submit, modify, or implement, as approved, the reports, plans, studies, analyses, protocols, or other submittals required by this Consent Decree	$750 during the first ten days, $1,000 thereafter
k. Using, selling, or transferring SO_2 Allowances, except as permitted in this Consent Decree	the surrender, pursuant to the procedures set forth in Paragraphs 55 through 57 of this Consent Decree, of SO_2 Allowances in an amount equal to four times the number of SO_2 Allowances used, sold, or transferred in violation of this Consent Decree
l. Using, selling or transferring NO_x Allowances except as permitted in Paragraphs 68 through 71	the surrender of NO_x Allowances in an amount equal to four times the number of NO_x Allowances used, sold, or transferred in violation of this Consent Decree
m. Failure to surrender an SO_2 Allowance as required by Subsection B (Surrender of SO_2 Allowances) of Section IV (SO_2 Emission Reductions and Controls)	(a) $27,500 plus (b) $1,000 per SO_2 Allowance
n. Failure to undertake and complete any of the Projects in compliance with Section VIII (Additional Injunctive Relief) of this Consent Decree	$1,000 during the first 30 days, $5,000 thereafter
o. Any other violation of this Consent Decree	$1,000

120. Notwithstanding the foregoing, the Settling Defendants shall not be liable for failure to comply with a 30-Day Rolling Average Removal Efficiency for SO_2 if the Settling Defendants are in full compliance with the requirements of Paragraph 49 of this Consent Decree, such exceedance is due to the Settling Defendants' efforts to reduce ice formation on a wet FGD stack by resorting to a partial bypass of their FGD, and the Settling Defendants maintain a 30-Day Rolling Average Removal Efficiency for SO_2 of no less than 83% during such periods of

partial bypass.

121. Violation of an Emission Rate or removal efficiency that is based on a 30-Day Rolling Average is a violation on every day on which the average is based.

122. Where a violation of a 30-Day Rolling Average Removal Efficiency (from the same source) recurs within periods of less than thirty (30) days, the Settling Defendants shall not pay a daily stipulated penalty for any day of the recurrence for which a stipulated penalty has already been paid.

123. All stipulated penalties shall begin to accrue on the day after the performance is due or on the day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Nothing in this Consent Decree shall prevent the simultaneous accrual of separate stipulated penalties for separate violations of this Consent Decree.

124. The Settling Defendants shall pay all stipulated penalties to the Plaintiffs within thirty (30) days of receipt of written demand to the Settling Defendants from the United States, and shall continue to make such payments every thirty (30) days thereafter until the violation(s) no longer continues, unless the Settling Defendants elects within 20 days of receipt of written demand to the Settling Defendants from the United States to dispute the accrual of stipulated penalties in accordance with the provisions in Section XV (Dispute Resolution) of this Consent Decree.

125. Stipulated penalties shall continue to accrue as provided in Paragraph 119 during any dispute, with interest on accrued stipulated penalties payable and calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid

until the following:

a. If the dispute is resolved by agreement, or by a decision of Plaintiffs pursuant to Section XV (Dispute Resolution) of this Consent Decree that is not appealed to the Court, accrued stipulated penalties agreed or determined to be owing, together with accrued interest, shall be paid within thirty (30) days of the effective date of the agreement or of the receipt of Plaintiffs' decision;

b. If the dispute is appealed to the Court and Plaintiffs prevail in whole or in part, the Settling Defendants shall, within sixty (60) days of receipt of the Court's decision or order, pay all accrued stipulated penalties determined by the Court to be owing, together with accrued interest, except as provided in Subparagraph (c);

c. If the Court's decision is appealed by any Party, the Settling Defendants shall, within fifteen (15) days of receipt of the final appellate court decision, pay all accrued stipulated penalties determined to be owing, together with accrued interest.

For purposes of this Paragraph, the accrued stipulated penalties agreed by the Parties, or determined by the Plaintiffs through Dispute Resolution, to be owing may be less than the stipulated penalty amounts set forth in Paragraph 119. The Settling Defendants need not pay any stipulated penalties based on violations which they dispute and ultimately prevail under the Dispute Resolution provisions of this Consent Decree.

126. All stipulated penalties shall be paid in the manner set forth in Section IX (Civil Penalty) of this Consent Decree.

127. Should the Settling Defendants fail to pay stipulated penalties in compliance with

the terms of this Consent Decree, the Plaintiffs shall be entitled to collect interest on such penalties, as provided for in 28 U.S.C. § 1961.

128. The stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to any Plaintiff by reason of the Settling Defendants' failure to comply with any requirement of this Consent Decree or applicable law, except that for any violation of the Act for which this Consent Decree provides for payment of a stipulated penalty, the Settling Defendants shall be allowed a credit for stipulated penalties paid against any statutory penalties also imposed for such violation.

XIV. FORCE MAJEURE

129. For purposes of this Consent Decree, a "Force Majeure Event" shall mean an event that has been or will be caused by circumstances beyond the control of the Settling Defendants, their contractors, or any entity controlled by the Settling Defendants that delays compliance with any provision of this Consent Decree or otherwise causes a violation of any provision of this Consent Decree despite the Settling Defendants' best efforts to fulfill the obligation. "Best efforts to fulfill the obligation" include using best efforts to anticipate any potential Force Majeure Event and to address the effects of any such event (a) as it is occurring and (b) after it has occurred, such that the delay or violation is minimized to the greatest extent possible.

130. **Notice of Force Majeure Events.** If any event occurs or has occurred that may delay compliance with or otherwise cause a violation of any obligation under this Consent Decree, as to which the Settling Defendants intends to assert a claim of Force Majeure, the Settling Defendants shall notify the United States and the State in writing as soon as practicable, but in no event later than fourteen (14) business days following the date the Settling Defendants

first knew, or by the exercise of due diligence should have known, that the event caused or may cause such delay or violation. In this notice, the Settling Defendants shall reference this Paragraph of this Consent Decree and describe the anticipated length of time that the delay or violation may persist, the cause or causes of the delay or violation, all measures taken or to be taken by the Settling Defendants to prevent or minimize the delay or violation, the schedule by which the Settling Defendants proposes to implement those measures, and the Settling Defendants' rationale for attributing a delay or violation to a Force Majeure Event. The Settling Defendants shall adopt all reasonable measures to avoid or minimize such delays or violations. The Settling Defendants shall be deemed to know of any circumstance which the Settling Defendants, their contractors, or any entity controlled by the Settling Defendants knew or should have known.

131. **Failure to Give Notice**. If the Settling Defendants fails to comply with the notice requirements in the preceding Paragraph, the Plaintiffs may void the Settling Defendants' claim for Force Majeure as to the specific event for which the Settling Defendants have failed to comply with such notice requirement.

132. **Plaintiffs' Response.** The Plaintiffs shall notify the Settling Defendants in writing regarding the Settling Defendants' claim of Force Majeure within twenty (20) business days of receipt of the notice provided under Paragraph 130. If the Plaintiffs agree that a delay in performance has been or will be caused by a Force Majeure Event, the Parties shall stipulate to an extension of deadline(s) for performance of the affected compliance requirement(s) by a period equal to the delay actually caused by the event. In such circumstances, an appropriate modification shall be made pursuant to Section XXII (Modification) of this Consent Decree.

133. **Disagreement.** If the Plaintiffs do not accept the Settling Defendants' claim of Force Majeure, or if the Parties cannot agree on the length of the delay actually caused by the Force Majeure Event, the matter shall be resolved in accordance with Section XV (Dispute Resolution) of this Consent Decree.

134. **Burden of Proof.** In any dispute regarding Force Majeure, the Settling Defendants shall bear the burden of proving that any delay in performance or any other violation of any requirement of this Consent Decree was caused by or will be caused by a Force Majeure Event. The Settling Defendants shall also bear the burden of proving that the Settling Defendants gave the notice required by Paragraph 130 and the burden of proving the anticipated duration and extent of any delay(s) attributable to a Force Majeure Event. An extension of one compliance date based on a particular event may, but will not necessarily, result in an extension of a subsequent compliance date.

135. **Events Excluded.** Unanticipated or increased costs or expenses associated with the performance of the Settling Defendants' obligations under this Consent Decree shall not constitute a Force Majeure Event.

136. **Potential Force Majeure Events**. The Parties agree that, depending upon the circumstances related to an event and the Settling Defendants' response to such circumstances, the kinds of events listed below are among those that could qualify as Force Majeure Events within the meaning of this Section: construction, labor, or equipment delays; Malfunction of a Unit or emission control device; acts of God; acts of war or terrorism; and orders by a government official, government agency, or other regulatory body acting under and authorized by applicable law that directs the Settling Defendants to supply electricity in response to a

system-wide (state-wide or regional) emergency. Depending upon the circumstances and the Settling Defendants' response to such circumstances, failure of a permitting authority to issue a necessary permit in a timely fashion may constitute a Force Majeure Event where the failure of the permitting authority to act is beyond the control of the Settling Defendants and the Settling Defendants have taken all steps available to it to obtain the necessary permit, including, but not limited to: submitting a complete permit application; responding to requests for additional information by the permitting authority in a timely fashion; and accepting lawful permit terms and conditions after expeditiously exhausting any legal rights to appeal terms and conditions imposed by the permitting authority, provided that the Settling Defendants shall not be precluded from asserting that a new Force Majeure Event has caused or may cause a new or additional delay in complying with the extended or modified schedule.

137. As part of the resolution of any matter submitted to this Court under Section XV (Dispute Resolution) of this Consent Decree regarding a claim of Force Majeure, the Parties by agreement, or this Court by order, may in appropriate circumstances extend or modify the schedule for completion of work under this Consent Decree to account for the delay in the work that occurred as a result of any delay agreed to by the United States and the State or approved by the Court. The Settling Defendants shall be liable for stipulated penalties for their failure thereafter to complete the work in accordance with the extended or modified schedule.

138. **Malfunctions.** The Settling Defendants shall notify EPA and NDDH in writing of each Malfunction impacting a pollution control technology required by this Consent Decree as soon as practicable, but in no event later than fourteen (14) business days following the date that the Settling Defendants first knew, or by the exercise of due diligence should have known, of the

Malfunction. The Settling Defendants shall be deemed to know of any circumstance which the Settling Defendants, their contractors, or any entity controlled by the Settling Defendants knew or should have known. In this notice, the Settling Defendants shall describe the anticipated length of time that the Malfunction may persist, the cause or causes of the Malfunction, all measures taken or to be taken by the Settling Defendants to minimize the duration of the Malfunction, and the schedule by which the Settling Defendants proposes to implement those measures. The Settling Defendants shall adopt all reasonable measures to minimize the duration of such Malfunctions and, consistent with 40 C.F.R. § 60.11(d), shall, to the extent practicable, maintain and operate any affected Unit and associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. A Malfunction, as defined in Paragraph 16 of this Consent Decree, does not constitute a Force Majeure Event unless the Malfunction also meets the definition of a Force Majeure Event, as provided in this Section. Conversely, a period of Malfunction may be excluded by the Settling Defendants from the calculations of emission rates and removal efficiencies, as allowed under this Paragraph, if the Malfunction constitutes a Force Majeure event.

XV. DISPUTE RESOLUTION

139. The dispute resolution procedure provided by this Section shall be available to resolve all disputes arising under this Consent Decree, provided that the Party invoking such procedure has first made a good faith attempt to resolve the matter with the other Parties.

140. The dispute resolution procedure required herein shall be invoked by one Party giving written notice to the other Parties advising of a dispute pursuant to this Section. The notice shall describe the nature of the dispute and shall state the noticing Party's position with

regard to such dispute. The Parties receiving such a notice shall acknowledge receipt of the notice, and the Parties in dispute shall expeditiously schedule a meeting to discuss the dispute informally not later than fourteen (14) days following receipt of such notice.

141. Disputes submitted to dispute resolution under this Section shall, in the first instance, be the subject of informal negotiations among the disputing Parties. Such period of informal negotiations shall not extend beyond thirty (30) calendar days from the date of the first meeting among the disputing Parties' representatives unless they agree in writing to shorten or extend this period. During the informal negotiations period, the disputing Parties may also submit their dispute to a mutually-agreed-upon alternative dispute resolution ("ADR") forum if the Parties agree that the ADR activities can be completed within the 30-day informal negotiations period (or such longer period as the Parties may agree to in writing).

142. If the disputing Parties are unable to reach agreement during the informal negotiation period, the Plaintiffs shall provide the Settling Defendants with a written summary of their position regarding the dispute. The written position provided by the Plaintiffs shall be considered binding unless, within forty-five (45) calendar days thereafter, the Settling Defendants seeks judicial resolution of the dispute by filing a petition with this Court. The Plaintiffs may respond to the petition within forty-five (45) calendar days of filing.

143. Where the nature of the dispute is such that a more timely resolution of the issue is required, the time periods set out in this Section may be shortened upon motion of one of the Parties to the dispute.

144. This Court shall not draw any inferences nor establish any presumptions adverse to any disputing Party as a result of invocation of this Section or the disputing Parties' inability to

reach agreement.

145. As part of the resolution of any dispute under this Section, in appropriate circumstances the disputing Parties may agree, or this Court may order, an extension or modification of the schedule for the completion of the activities required under this Consent Decree to account for the delay that occurred as a result of dispute resolution. The Settling Defendants shall be liable for stipulated penalties for their failure thereafter to complete the work in accordance with the extended or modified schedule, provided that the Settling Defendants shall not be precluded from asserting that a Force Majeure Event has caused or may cause a delay in complying with the extended or modified schedule.

146. The Court shall decide all disputes pursuant to applicable principles of law for resolving such disputes. In their initial filings with the Court under Paragraph 142, the disputing Parties shall state their respective positions as to the applicable standard of law for resolving the particular dispute.

147. This Paragraph shall govern all disputes under this Consent Decree between any Party regarding the BACT Determination provided by NDDH under Section V(B) of this Consent Decree. The Settling Defendants hereby waive their rights to challenge or dispute NDDH's BACT Determination other than through this Paragraph, which shall constitute the sole means by which the Settling Defendants may dispute such determination.

a. If any Party does not agree, in whole or in part, with NDDH's BACT Determination or with the 30-Day Rolling Average NO_x Emission Rate established by NDDH as part of its BACT Determination, it shall notify the other Parties within thirty (30) days of receipt of the BACT Determination. The notice

shall describe the particular reason(s) for disagreeing with NDDH's BACT Determination. The disputing Party shall bear the burden of proof throughout the dispute resolution process. The Parties to the dispute shall endeavor to resolve the dispute informally for up to thirty (30) days following issuance of such notice.

b. If the Parties to the dispute do not reach an agreement during this informal dispute resolution process, each disputing Party shall provide the other Parties with a written summary of its position within thirty (30) calendar days after the end of the informal process. The written position(s) provided by the State shall be considered binding unless, within forty-five (45) calendar days thereafter, a Party files with this Court a petition which describes the nature of the dispute and seeks judicial resolution. The other Parties to the dispute shall respond to the petition(s) within forty-five (45) calendar days of each such filing.

c. The Court shall sustain the decision by NDDH unless the Party disputing the BACT Determination demonstrates that it is not supported by the state administrative record and not reasonable in light of applicable statutory and regulatory provisions.

XVI. PERMITS

148. Unless expressly stated otherwise in this Consent Decree (e.g. Paragraph 109), in any instance where otherwise applicable law or this Consent Decree requires the Settling Defendants to secure a permit to authorize construction or operation of any device, including all preconstruction, construction, and operating permits required under state law, the Settling

Defendants shall make such application in a timely manner. The United States and NDDH will use their best efforts to expeditiously review all permit applications submitted by the Settling Defendants in order to meet the requirements of this Consent Decree.

149. When permits are required, the Settling Defendants shall complete and submit applications for such permits to the appropriate authorities to allow sufficient time for all legally required processing and review of the permit request, including requests for additional information by the permitting authorities. Any failure by the Settling Defendants to submit a timely permit application for any Unit at the Milton R. Young Station shall bar any use by the Settling Defendants of Section XIV (Force Majeure) of this Consent Decree, where a Force Majeure claim is based on permitting delays.

150. Notwithstanding the reference to the Title V permit in this Consent Decree, the enforcement of the permit shall be in accordance with its own terms and the Act. The Title V permit shall not be enforceable under this Consent Decree, although any term or limit established by or under this Consent Decree shall be enforceable under this Consent Decree regardless of whether such term has or will become part of a Title V permit, subject to the terms of Section XXVI (Conditional Termination of Enforcement Under Consent Decree) of this Consent Decree.

151. Within ninety (90) days after entry of this Consent Decree, the Settling Defendants shall amend any applicable Title V permit application, or apply for amendments of their Title V permit, to include a schedule for all unit-specific and plant-specific performance, operational, maintenance, and control technology requirements established by this Consent Decree including, but not limited to, emission rates, removal efficiencies, tonnage limitations, and the requirements pertaining to the surrender of SO_2 Allowances.

152. Within one (1) year from the commencement of operation of each pollution control device to be installed or upgraded on a Unit under this Consent Decree, the Settling Defendants shall apply to include the requirements and limitations enumerated in this Consent Decree in either a federally enforceable permit (other than a Title V permit) or amendments to the North Dakota State Implementations Plan ("SIP"). The permit or SIP amendment shall require compliance with the following: (a) any applicable 30-Day Rolling Average Emission Rate or 30-Day Rolling Average Removal Efficiency, (b) the allowance surrender requirements set forth in this Consent Decree, and (c) any applicable Tonnage limitations set forth in this Consent Decree.

153. The Settling Defendants shall provide the United States with a copy of each application for a federally enforceable permit or SIP amendment, as well as a copy of any permit proposed as a result of such application, to allow for timely participation in any public comment opportunity. The Settling Defendants and the NDDH agree to incorporate the SO_2 limitations in Subparagraphs 50(c) (and Subparagraph 50(d), if applicable) as federally-enforceable limits for the Settling Defendants in future permitting proceedings.

154. If the Settling Defendants sell or transfer to an entity unrelated to the Settling Defendants ("Third Party Purchaser") part or all of an ownership interest in a Unit ("Ownership Interest") covered under this Consent Decree, the Settling Defendants shall comply with the requirements of Paragraphs 148 through 153 with regard to that Unit prior to any such sale or transfer unless, following any such sale or transfer, the Settling Defendants remains the holder of the permit for such facility.

XVII. INFORMATION COLLECTION AND RETENTION

155. Any authorized representative of the Plaintiffs, including their attorneys, contractors, and consultants, upon presentation of credentials, shall have a right of entry upon the premises of any facility covered under this Consent Decree at any reasonable time for the purpose of:

a. monitoring the progress of activities required under this Consent Decree;

b. verifying any data or information submitted to the Plaintiffs in accordance with the terms of this Consent Decree;

c. obtaining samples and, upon request, splits of any samples taken by the Settling Defendants or their representatives, contractors, or consultants; and

d. assessing the Settling Defendants' compliance with this Consent Decree.

156. The Settling Defendants shall retain, and instruct their contractors and agents to preserve, all non-identical copies of all records and documents (including records and documents in electronic form) now in their or their contractors' or agents' possession or control, and that directly relate to the Settling Defendants' performance of their obligations under this Consent Decree, until December 31, 2020. This record retention requirement shall apply regardless of any corporate document retention policy to the contrary.

157. All information and documents submitted by the Settling Defendants pursuant to this Consent Decree shall be subject to public disclosure based on requests under applicable law providing for such disclosure unless (a) the information and documents are subject to legal privileges or protection or (b) the Settling Defendants claim and substantiate in accordance with 40 C.F.R. Part 2 that the information and documents contain confidential business information.

158. Nothing in this Consent Decree shall limit the authority of the Plaintiffs to conduct tests and inspections at facilities covered under this Consent Decree under Section 114 of the Act, 42 U.S.C. § 7414, or any other applicable federal or state laws, regulations or permits.

XVIII. NOTICES

159. Unless otherwise provided herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

As to the United States of America:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044-7611
DOJ# 90-5-2-1-07717

and

Director, Air Enforcement Division
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Ariel Rios Building [2242A]
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

and

U. S. EPA, Region 8
Director, Office of Enforcement, Compliance, and Environmental Justice
999 18th Street, Suite 300
Denver, Colorado 80202-2466

As to the State of North Dakota:

Director, Air Quality Division
North Dakota Department of Health

Bismark, North Dakota 58506-5520

As to the Settling Defendants:

David Sogard, General Counsel
John Graves, Environmental Manager
1822 State Mill Road
P.O. Box 13200
Grand Forks, ND 58208-3200

160. All notifications, communications or submissions made pursuant to this Section shall be sent either by: (a) overnight mail or delivery service; (b) certified or registered mail, return receipt requested; or (c) electronic transmission, unless the recipient is not able to review the transmission in electronic form. All notifications, communications and transmissions (a) sent by overnight, certified or registered mail shall be deemed submitted on the date they are postmarked, or (b) sent by overnight delivery service shall be deemed submitted on the date they are delivered to the delivery service. All notifications, communications, and submissions made by electronic means shall be electronically signed and certified, and shall be deemed submitted on the date that the Settling Defendants receive written acknowledgment of receipt of such transmission.

161. Any Party may change either the notice recipient or the address for providing notices to it by serving the other Parties with a notice setting forth such new notice recipient or address.

XIX. SALES OR TRANSFERS OF OWNERSHIP INTERESTS

162. If the Settling Defendants propose to sell or transfer part or all of their ownership interest in any of their real property or operations subject to this Consent Decree ("Ownership Interest") to an entity unrelated to the Settling Defendants ("Third Party Purchaser"), they shall

advise the Third Party Purchaser in writing of the existence of this Consent Decree prior to such sale or transfer, and shall send a copy of such written notification to the Plaintiffs pursuant to Section XVIII (Notices) at least sixty (60) days before such proposed sale or transfer.

163. No sale or transfer of an Ownership Interest shall take place before the Third Party Purchaser and the Plaintiffs have executed, and the Court has approved, a modification pursuant to Section XXII (Modification) of this Consent Decree making the Third Party Purchaser a party defendant to this Consent Decree and jointly and severally liable with the Settling Defendants for all the requirements of this Consent Decree that may be applicable to the transferred or purchased Ownership Interests, except as provided in Paragraph 165, below.

164. This Consent Decree shall not be construed to impede the transfer of any Ownership Interests between the Settling Defendants and any Third Party Purchaser as long the requirements of this Consent Decree are met. In addition, this Consent Decree shall not be construed to prohibit a contractual allocation–as between the Settling Defendants and any Third Party Purchaser of Ownership Interests–of the burdens of compliance with this Decree, provided that both the Settling Defendants and such Third Party Purchaser shall remain jointly and severally liable to the Plaintiffs for the obligations of the Decree applicable to the transferred or purchased Ownership Interests, except as provided in Paragraph 165.

165. If the Plaintiffs agree, the United States, the State, the Settling Defendants and the Third Party Purchaser that has become a party defendant to this Consent Decree pursuant to Paragraph 163 may execute a modification that relieves Minnkota and/or Square Butte of their liability under this Consent Decree for, and makes the Third Party Purchaser liable for, all obligations and liabilities applicable to the purchased or transferred Ownership Interests.

Notwithstanding the foregoing, however, the Settling Defendants may not assign, and may not be released from, any obligation under this Consent Decree that is not specific to the purchased or transferred Ownership Interests, including the obligations set forth in Sections VIII (Additional Injunctive Relief) and IX (Civil Penalty). The Settling Defendants may propose and the Plaintiffs may agree to restrict the scope of joint and several liability of any purchaser or transferee for any obligations of this Consent Decree that are not specific to the purchased or transferred Ownership Interests to the extent such obligations may be adequately separated in an enforceable manner.

XX. EFFECTIVE DATE

166. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

XXI. RETENTION OF JURISDICTION

167. **Continuing Jurisdiction.** The Court shall retain jurisdiction of this case after entry of this Consent Decree to enforce compliance with the terms and conditions of this Consent Decree and to take any action necessary or appropriate for its interpretation, construction, execution, modification, or adjudication of disputes. During the term of this Consent Decree, any Party to this Consent Decree may apply to the Court for any relief necessary to construe or effectuate this Consent Decree.

XXII. MODIFICATION

168. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all Parties. Where the modification constitutes a material change to any term of this Consent Decree, it shall be effective only upon approval by the Court.

XXIII. GENERAL PROVISIONS

169. This Consent Decree is not a permit. Compliance with the terms of this Consent Decree does not guarantee compliance with all applicable federal, state, or local laws or regulations. The removal efficiencies and emission rates set forth herein do not relieve the Settling Defendants from any obligation to comply with other state and federal requirements under the Clean Air Act, including the Settling Defendants' obligations to satisfy any state modeling requirements set forth in the North Dakota State Implementation Plan. Unless otherwise indicated herein, citations to statutes or regulations herein shall mean the version of the statutes or regulations in force as of July 1, 2005.

170. This Consent Decree does not apply to any claim(s) of alleged criminal liability.

171. In any subsequent administrative or judicial action initiated by the Plaintiffs for injunctive relief or civil penalties relating to the facilities covered by this Consent Decree, the Settling Defendants shall not assert any defense or claim based upon principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, or claim splitting, or any other defense based upon the contention that the claims raised by the Plaintiffs in the subsequent proceeding were brought, or should have been brought, in the instant case; provided, however, that nothing in this Paragraph is intended to, or shall, affect the validity of Section X (Resolution of Claims) of this Consent Decree.

172. Except as specifically provided by this Consent Decree, nothing in this Consent Decree shall relieve the Settling Defendants of their obligations to comply with all applicable federal, state, and local laws and regulations. Nothing contained in this Consent Decree shall be construed to prevent or limit the rights of the Plaintiffs to obtain penalties, injunctive relief or other relief under the Act or other federal, state, or local statutes, regulations, or permits.

173. Every term expressly defined by this Consent Decree shall have the meaning given to that term by this Consent Decree and, except as otherwise provided in this Consent Decree, every other term used in this Consent Decree that is also a term under the Act or the regulations implementing the Act shall mean in this Consent Decree what such term means under the Act or those implementing regulations.

174. Nothing in this Consent Decree is intended to, or shall, alter or waive any applicable law (including but not limited to any defenses, entitlements, challenges, or clarifications related to the Credible Evidence Rule, 62 Fed. Reg. 8315 (Feb. 27, 1997)) concerning the use of data for any purpose under the Act, generated either by the reference methods specified herein or otherwise.

175. Each limit and/or other requirement established by or under this Consent Decree is a separate, independent requirement.

176. Performance standards, emissions limits, and other quantitative standards set by or under this Consent Decree must be met to the number of significant digits in which the standard or limit is expressed. For example, an Emission Rate of 0.100 is not met if the actual Emission Rate is 0.101. The Settling Defendants shall round the fourth significant digit to the nearest third significant digit, or the third significant digit to the nearest second significant digit, depending

upon whether the limit is expressed to three or two significant digits. For example, if an actual Emission Rate is 0.1004, that shall be reported as 0.100, and shall be in compliance with an Emission Rate of 0.100, and if an actual Emission Rate is 0.1005, that shall be reported as 0.101, and shall not be in compliance with an Emission Rate of 0.100. The Settling Defendants shall report data to the number of significant digits in which the standard or limit is expressed.

177. This Consent Decree does not limit, enlarge or affect the rights of any Party to this Consent Decree as against any third parties.

178. This Consent Decree constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree, and supersedes all prior agreements and understandings among the Parties related to the subject matter herein. No document, representation, inducement, agreement, understanding, or promise constitutes any part of this Consent Decree or the settlement it represents, nor shall they be used in construing the terms of this Consent Decree.

179. The United States and the Settling Defendants shall bear their own costs and attorneys' fees.

XXIV. SIGNATORIES AND SERVICE

180. Each undersigned representative of the Parties certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind to this document the Party he or she represents.

181. This Consent Decree may be signed in counterparts, and such counterpart signature pages shall be given full force and effect.

182. Each Party hereby agrees to accept service of process by mail with respect to all

matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XXV. PUBLIC COMMENT

183. The Parties agree and acknowledge that final approval by the United States and entry of this Consent Decree is subject to the procedures of 28 C.F.R. § 50.7, which provides for notice of the lodging of this Consent Decree in the Federal Register, an opportunity for public comment, and the right of the United States to withdraw or withhold consent if the comments disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper or inadequate. The Settling Defendants shall not oppose entry of this Consent Decree by this Court or challenge any provision of this Consent Decree unless the United States has notified the Settling Defendants, in writing, that the United States no longer supports entry of the Consent Decree.

XXVI. CONDITIONAL TERMINATION OF ENFORCEMENT UNDER CONSENT DECREE

184. **Termination as to Completed Tasks.** As soon as the Settling Defendants complete a construction project or any other requirement of this Consent Decree that is not ongoing or recurring, the Settling Defendants may, by motion to this Court, seek termination of the provision or provisions of this Consent Decree that imposed the requirement.

185. **Conditional Termination of Enforcement Through the Consent Decree.** After the Settling Defendants:

a. have successfully completed construction, and have maintained operation, of all

pollution controls as required by this Consent Decree;

b. have obtained a final Title V permit (I) as required by the terms of this Consent Decree; (ii) that cover all units in this Consent Decree; and (iii) that include as enforceable permit terms all of the Unit performance and other requirements specified in Section XVI (Permits) of this Consent Decree; and

c. certified that the date is later than December 31, 2015;

then the Settling Defendants may so certify these facts to the Plaintiffs and this Court. If the Plaintiffs do not object in writing with specific reasons within forty-five (45) days of receipt of the Settling Defendants' certification, then, for any Consent Decree violations that occur after the filing of notice, the Plaintiffs shall pursue enforcement of the requirements contained in the Title V permit through the applicable Title V permit and not through this Consent Decree.

186. **Resort to Enforcement under this Consent Decree.** Notwithstanding Paragraph 187, if enforcement of a provision in this Consent Decree cannot be pursued by a Party under the applicable Title V permit, or if a Consent Decree requirement was intended to be part of a Title V Permit and did not become or remain part of such permit, then such requirement may be enforced under the terms of this Consent Decree at any time, unless and until the Settling Defendants have secured a source-specific revision to the North Dakota State Implementation Plan to reflect the emission limitations, emissions monitoring, and allowance surrender requirements set forth in this Consent Decree.

XXVII. FINAL JUDGMENT

187. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment in the above-captioned matter between the Plaintiffs and the Settling Defendants.

SO ORDERED, THIS _____ DAY OF _____, 2006.

_____
UNITED STATES DISTRICT COURT JUDGE

FOR THE UNITED STATES OF AMERICA:

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
Environmental and Natural Resources Division
United States Department of Justice

MATTHEW W. MORRISON
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